by them on account of the delay on the part of the sub-contractors. For this they relied on clause 13 of the sub-contract which provided that notwithstanding anything in the sub-contract, the main contractor was entitled to deduct from or off-set against any money due from him to the sub-contractors any sum or sums which the sub-contractor was liable to pay to the main contractor under the sub-contract. It was held by the Court of Appeal that since the main contractors' cross-claim for damages for delay was challenged and had not been quantified, it did not come within Clause 13 of the sub-contract. *Dawnay's* case, however, was disapproved by the House of Lords in *Gilbert Ash (Northern) Limited* v. *Modern Engineering (Bristol) Limited* in which it was held that the common law right of a defendant to a set-off could only be taken away by clear, unequivocal words. Although this decision of the House of Lords was not binding on the learned trial judge, I do not think he was wrong in following it. I must therefore reject this ground of appeal.

It would seem clear from what I have said that the defendants had no defence to the plaintiffs' claim except to the extent of their set-off and counter-claim in respect of the alleged damages for the delay. I do not think it would be proper for this court to express an opinion as to whether this set-off and counter-claim is likely to succeed, although it is abundantly clear that the defendants themselves did not have to pay any damages to the Sarawak Government for the alleged delay. Indeed, it was conceded by the defendants that even if judgment were to be entered against them it should only be for the amount of the plaintiffs' claim less the sum of $16,920 as retention money and the sum of $85,000 in respect of their set-off and counter-claim. I do not think the retention money can be taken into account at this late stage. In all the circumstances of the case, I do not think it was right for the learned trial judge to have dismissed the plaintiffs' application for summary judgment. The proper order for him to make was to sign judgment for the amount of the claim less the amount of the set-off and counter-claim and to allow the defendants unconditional leave to defend as regards the balance of the claim. The other order which he could properly have made was to grant the defendants leave to defend conditional upon their paying into court the amount of the plaintiffs' claim.

In the final analysis, the matter before the learned trial judge was fairly simple. Assuming that he took the view that the defendants had raised some sort of triable issues, the question which he had then to consider was whether he should grant the defendants unconditional or conditional leave to defend. As I have already stated, the defence put up by the defendants was a sham defence. There was clearly very little substance in the defendants' claim to a right of set-off and counter-claim in respect of the alleged damages for the delay in the completion of the works. It should therefore have been looked upon with considerable suspicion as to its *bona fides*. In the circumstances, the learned trial judge should have granted the defendants leave to defend conditional upon their paying into court the amount of the plaintiffs' claim.

For the reasons I have stated, I would allow this appeal with costs, set aside the order made by the learned trial judge and substitute in its place an order that the defendants do have leave to defend the action conditional upon their paying into court the sum of $269,754 within 14 days from the date of this order, failing which the plaintiffs do have liberty to sign judgment of that amount. I would also make a further order that in the event of the defendants paying the money into court, the action be set down for trial in priority.

Azmi L.P. and **Lee Hun Hoe C.J. (Borneo)** concurred.

Appeal allowed.

Solicitors: *Chong Bros.; Yong & Co.*

LIM YOKE FOO v. PUN TAT MENG

[O.C.J. (Pawan Ahmad J.) June 6, 1974]
[Kuala Lumpur — Civil Suit No. 89 of 1974]

Practice and Procedure — Application to set aside judgment in default of appearance — Merits of application — Licensee of land — Defendant claims plaintiff estopped from claiming that defendant is a trespasser.

This was an application to set aside a judgment obtained by the plaintiff in default of appearance by the defendant. The affidavit of the defendant alleged that as the previous owners had no objection to his entry upon the plaintiff's land, and as he had incurred considerable expenditure in building on the land in expectation of being allowed to stay as long as he liked, he was a licensee and the plaintiff was estopped from alleging he was a trespasser. The plaintiff's argument was that the defendant was a bare licensee whose licence had been terminated by a notice to quit.

Held: as the defendant entered the land neither as a result of a mistaken belief that it was his land nor at the invitation or with the consent of the owner, and following *Gurbachan Singh* v. *Sharikat Bakti Ltd.*(8) the defendant being a bare licensee, this application failed.

Cases referred to:-

(1) *Sir J.W. Ramsden, Bart* v. *Lee Dyson and Joseph Thornton* (1866) L.R. 1 H.L. 129, 140.
(2) *Plimmer and Anor.* v. *The Mayor, Councillors and Citizens of the City of Wellington* [1884] 9 A.C. 699.
(3) *Inwards & Ors.* v. *Baker* [1965] 1 All E.R. 446, 448.
(4) *Hopgood* v. *Brown* [1955] 1 All E.R. 550, 559.
(5) *Ward* v. *Kirkland* [1966] 1 All E.R. 609, 624.
(6) *E.R. Ives Investments Ltd.* v. *High* [1967] 1 All E.R. 504, 507.
(7) *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1.
(8) *Gurbachan Singh* v. *Sharikat Bakti Ltd.* [1967] 1 M.L.J. 235.

CIVIL SUIT.

Ronald Khoo for the plaintiff.

Tee Keng Hoon for the defendant.

Pawan Ahmad J.: This is an application by the defendant to set aside an order of court dated February 26, 1974 in which judgment was entered in default of appearance against the defendant. This application made by Summons-in-Chambers is dated April 8, 1974 and is supported by two affidavits of Pun Tat Meng dated March 8, 1974 (enclosure 11) and March 18, 1974 (enclosure 13) respectively.

In his affidavit dated March 8, 1974 the defendant states that he failed to enter appearance within the specified period simply because when he was served with the writ of summons on February 7, 1974 he was under the mistaken impression that it was not meant by way of service on him. According to him he contacted Mr. Tee Keng Hoon, a Legal Assistant with Messrs Allen & Gledhill as early as February 11, 1974 yet he told the Legal Assistant that the summons was not meant by way of service on him. He reassured the Legal Assistant again on February 12 and 13, 1974 that a copy of the summons had not been served on him.

On February 23, 1974 the defendant received a copy of the Notice of Motion (enclosure 3) and so on February 25, 1974 the defendant went to see the Legal Assistant again and finally on February 27, 1974, his solicitors entered an appearance on his behalf.

It is however apparent on the face of the Writ of Summons (enclosure 1) that it was served on the defendant as a defendant and not as a witness. Moreover, if he thought that it was not meant by way of service on him, it is inconceivable why he should contact a Legal Assistant repeatedly on February 11, 12 and 13, 1974 and also why he had to reassure the Legal Assistant that he had not been served. A supporting affidavit from the Legal Assistant is also lacking. In the circumstances the defendant's explanation for his failure to enter an appearance within the stipulated period does not appear to be very convincing.

The remaining aspect of the defendant's affidavit is confined to a defence on the merits. It is the defendant's case that since the previous owners did not raise any objection to his entry and as he has incurred considerable expenditure in erecting the building on the land in expectation of being allowed to stay as long as he likes, he is a licensee and therefore the notices to quit are ineffective and the plaintiff is estopped from alleging that the defendant is a trespasser. In support of this argument the defendant relies on the following authorities:—

(a) *Sir J. W. Ramsden, Bart.* v. *Lee Dyson and Joseph;*[1]

(b) *Plimmer and Anor.* v. *The Mayor, Councillors and Citizens of the City of Wellington;*[2]

(c) *Inwards & Ors.* v. *Baker;*[3]

(d) *Hopgood* v. *Brown;*[4]

(e) *Ward* v. *Kirkland;*[5]

(f) *E. R. Ives Investments Ltd.* v. *High.*[6]

In short, the plaintiff's argument is that although the defendant was a licensee, he was only a bare licensee and his licence was terminated by the plaintiff's notice to quite served on the defendant and any further occupation by the defendant after the expiration of the period stated in the notice, the defendant occupied it as a trespasser and could lawfully be ejected.

From the facts of the case it would appear that when the defendant moved in and erected a building in 1962 on a portion of the land known as E.M.R. 4236 Lot 689, Mukim of Petaling, District of Kuala Lumpur, the owners of the said land were Yee Seng Rubber Co. Sdn. Bhd. and no objection was raised by the owners. It was only about 10 years later that the defendant for the first time received an objection from the owners by a notice to quit dated July 5, 1972 followed by another notice to quit dated July 21, 1972. Subsequently on January 12, 1973 the defendant received yet another notice to quit but this time from the plaintiff who is the present owner.

Coming back to the authorities relied upon by the defendant it would appear that in those cases the defendant went and occupied the land either as a result of a mistaken belief that it was their own land, or that they were invited on to the land by the owner or that they had the consent of the owner. In my view these authorities can therefore be distinguished from the present case because in the present case the defendant entered the land neither as the result of a mistaken belief, nor at the invitation of the owner or with the consent of the owner. In my opinion a licence passes no interest and a mere licence is always revocable, but when a licence is coupled with an interest, or if granted for valuable consideration, it is in general irrevocable. See *Hurst* v. *Picture Theatres Ltd.*[7] Further, in the case of *Gurbachan Singh* v. *Sharikat Bakti Ltd.*[8] the Federal Court allowed the appeal and set aside the order of the High Court giving leave that judgment be summarily entered against the defendant because the defendant raised the issue that he had been a lawful tenant of the land by paying ground rent to the agent of the previous owner of the land and that he was not a bare licensee. The question of paying any rent is not raised in the defendant's affidavits and therefore applying the principles set out in *Gurbachan Singh* v. *Sharikat Bakti Ltd.* the defendant's application must fail. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Shearn Delamore & Co.; Allen & Gledhill.*

PHILIP HOALIM JR. & ANOR. v. STATE COMMISSIONER, PENANG

[F.C. (Azmi L.P., Ali and Raja Az'an Shah F.JJ.) June 10, 1974]

[Penang — Federal Court Special Case No. 1 of 1973]

Land Law — Lands in Penang originally granted by East India Company or High Commissioner on behalf of British Crown — Replacement titles issued — Whether such land alienated land — Whether it is "land alienated before the commencement of the Code" — Whether Governor bound in regard to rights, liabilities and obligations which formally bound Her Majesty's Government — Legislation imposing or providing for increase of rent — Whether legislation contrary to Federal Constitution — Federal Constitution arts. 13 and 167(2)(a) — National Land Code (Penang and Malacca Titles) Act, 1963 — National Land Code, 1965, ss. 5, 101(1) and 102(1).

In this case the applicant had by notice of motion filed in the High Court asked that certain orders made under the National Land Code, 1965 be declared null and void. One of these orders had the effect of making the applicant's land, which was originally granted by the East India Company or the British High Commissioner on behalf of the British Crown, subject to rent. The learned judge of the High Court stated a case for the opinion of the Federal Court as he was of the view that a question as to the effect of the Federal Constitution had arisen. The questions framed by the learned judge were as follows:—